

CHAPTER VII

EMPLOYMENT

Section 5. Harassment Cases

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## A. Legal Standards for Harassment Cases

### 1. The Scope of This Section

This section covers cases in which the adverse action is harassment; offensive conduct occurring within the scope of employment directed at a complainant because of that person's protected status (e.g., race, color, national origin, etc.).

In some harassment cases, the "causal connection" to the complainant's protected status will not be in dispute while in others it will have to be proven. Both types of cases will be covered in this section.

With the exception of "sexual" harassment, all other types of harassing acts, on any basis enumerated in the FEHA (including "sex" harassment where the complainant's status as a woman is the focus of harassment) may be analyzed by applying the legal standards and outlines discussed in this Section.

While the analysis for the first category of work-environment harassment case ("Causal Connection Not Disputed") discussed here also applies to "sexual" harassment cases, sexual harassment complaints frequently involve additional acts of harm which we call "conditional" sexual harassment and are different in other ways as well. Since sexual harassment cases may require a different type of analysis and sometimes need additional proof, they are covered separately in Section 6 of this volume. There you will find five different types of sexual harassment cases discussed in great detail. Be sure to read that section carefully before analyzing a sexual harassment complaint.

Harassing acts often force a complainant to constructively discharge; that is, the harassment becomes so intolerable that the complainant is forced to resign. Constructive discharge cases are discussed in Section 3 of this volume. (See also, "Sexual Harassment Cases" for an analysis of "sexual" harassment that results in constructive discharge.)

Note: Harassment cases are different from other types of employment discrimination cases in that jurisdiction in harassment complaints is extended to employers that have one or more employees. For all other types of cases, the definition of employer for jurisdictional purposes remains the same, i.e., five or more employees.

## 2. The Legal Standards

Work-environment Harassment: this refers to situations in which the acts of harassment create an intimidating, oppressive, hostile, or offensive working environment thereby causing the complainant to lose the intangible employment benefit of a discrimination-free workplace. (See the "Sexual Harassment Cases" section for a discussion of "work-environment" and "conditional" sexual harassment.) All harassment complaints are potentially "work-environment" harassment.

The FEHA, Commission regulations and precedential decisions have established the following multi-part legal standards for two categories of work-environment harassment cases:

### a. Work-Environment Harassment--"Causal Connection Not Disputed"

#### II. Discrimination

Work-environment harassment is shown if:

- A. Acts qualifying as racial (national origin, religious, etc.) harassment occurred. Harassing acts will so qualify if the focus and/or content of the harassing acts is the complainant's protected status; and
- B. These harassing acts created an intimidating, oppressive, hostile, or offensive working environment or otherwise interfered with the complainant's emotional well-being or ability to perform his or her work; and
- C. The respondent is liable for the acts of harassment that occurred. Respondent liability is shown if:
  1. A supervisor or agent of the respondent was the harasser, or
  2. A nonsupervisory employee was the harasser, and the respondent had actual or constructive knowledge of the harassment. Constructive knowledge exists if the respondent should have known of the harassment. Constructive knowledge will be imputed to the respondent if, among other things, the respondent did not take preventative measures to keep the harassment from occurring.
  3. If the respondent had actual knowledge of the harassment by its nonsupervisory employee, the respondent will not be liable for this harassment if it took immediate and appropriate corrective action.

b. Work-Environment Harassment--"Causal Connection Disputed"

II. Discrimination

Work-environment harassment is shown if:

- A. Acts of harassment occurred, and a causal connection between the harassing acts and the complainant's protected status can be proven; and
- B. These harassing acts created an intimidating, oppressive, hostile, or offensive working environment or otherwise interfered with the complainant's emotional well-being or ability to perform his or her work; and
- C. The respondent is liable for the acts of harassment that occurred. Respondent liability is shown if:
  - 1. A supervisor or agent of the respondent was the harasser, or
  - 2. A nonsupervisory employee was the harasser, and the respondent had actual or constructive knowledge (knew or should have known) of the harassment. Constructive knowledge will be imputed to the respondent if, among other things, the respondent did not take preventative measures to keep the harassment from occurring.
  - 3. If the respondent had actual knowledge of the harassment by its nonsupervisory employee, the respondent will not be liable for this harassment if it took immediate and appropriate corrective action.

### 3. Discussion of the Legal Standards

#### a. Work-Environment Harassment

Section 12940(h) of the FEHA states that it is unlawful:

For an employer, labor organization, employment agency, apprenticeship training program or any other training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age, to harass an employee or applicant. Harassment of an employee or applicant by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.<sup>1</sup>

Under the FEHA, we usually establish discrimination by showing that an individual was denied an employment benefit because of his protected status. One employment benefit that is guaranteed by the FEHA is a discrimination-free workplace (see Section 12940(a) of the Act and Commission regulations Sections 7286.5(f), (f)(3), 7286.6(b)). Thus, subjecting an employee or applicant to harassing adverse actions on a basis enumerated in the Act constitutes discrimination where that individual is denied the intangible employment benefit of a discrimination-free workplace.

Since all types of harassment may potentially deny a person this intangible employment benefit, we use the term "work-environment" harassment in our analysis of these cases. (Other types of harassment cases also exist where a complainant loses a tangible employment benefit, such as a job, promotion, pay, etc. Known as "conditional harassment", this type of case is discussed in Section 6, "Sexual Harassment Cases.")

The remedy for work-environment harassment under the FEHA includes, but is not limited to, affirmative or general relief and compensatory damages for emotional injury. (Compensatory damages are not available through EEOC under Title VII.)

In general, we may establish discrimination in work-environment harassment cases if a preponderance of all evidence demonstrates: 1) that acts qualifying as racial (national origin, religious, etc.) harassment did occur, 2) that these actions affected the complainant adversely by depriving him or her of the intangible employment benefit of a discrimination-free workplace, and 3) that

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<sup>1</sup>Effective January 1, 1985, "employer," for purposes of subdivision 12940(h) only, was defined as any person regularly employing one or more persons. Thus, in cases in which harassment is the alleged act of harm, jurisdiction has been extended to employers that have one or more employees.

the respondent, itself, can be held liable for the harassment that occurred.

This multi-part legal standard is explained in detail in "Explanation of Analytical Outline" in the second half of this section. The discussion there includes examples of what types of behavior constitute "harassing" acts and under what circumstances these harassing acts qualify as "racial" (national origin, religious, etc.) harassment. Also, special liability rules apply if co-workers are the harassers. These rules are discussed under the appropriate questions on Analytical Outlines 1 and 2.

In addition, when analyzing work-environment harassment cases, we distinguish two separate varieties of complaints: 1) cases in which the causal connection to the complainant's protected status is not disputed; and 2) cases in which the causal link is disputed. (These cases differ only with regard to the first element of the legal standard.)

Most types of work-environment harassment cases fall under category 1. This category covers the kinds of harassment where the harassing acts, themselves, tell us what the complainant's protected status is, and there is no question that these acts qualify as "racial" (national origin, religious, etc.) harassment.

For example, a Black complainant is called a racially derogatory name by a supervisor. The content and focus of this racially derogatory remark is the complainant's race. Thus, we know automatically that this remark was made "because of" the complainant's protected status, and we do not have to prove a causal connection to the complainant's race.

A smaller number of cases will fall under category 2. This category covers those cases in which the harassing acts are "neutral," that is, the harassment itself does not tell us what the protected basis is. For example, White co-workers provoke a fight with a Black complainant. The nature of the harassment itself does not tell us whether the fight was done "because of" the complainant's race. Therefore, in order to qualify as "racial" harassment, we must show that a causal connection between harassment and the complainant's protected status exists.

Both categories of cases are discussed further on Analytical Outlines 1 and 2.

b. Failure to Take All Reasonable Steps to Prevent Harassment as a Separate Violation of the Act

Section 12940(h) of the Act states, in part, that:

An entity shall take all reasonable steps to prevent harassment from occurring.

Section 12940(i) states that it is unlawful:

For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

These sections of the Act thus establish a respondent's statutory duty to take all reasonable steps necessary to prevent harassment from occurring. A failure to fulfill this duty is a separate violation of the Act. Commission precedential decisions have held that a failure by an employer to promptly and effectively investigate and remedy complaints of harassment constitutes a failure to carry out its duty to prevent harassment. A prompt and full response to complaints is viewed as a good means to deter future misbehavior (see Del Mar Avionics, FEHC Dec. No. 85-19, p. 32 and Madera County, FEHC Dec. No. 90-03, p. 27). A failure to take other preventive measures, such as establishing an antiharassment policy, may also constitute a violation of Sections 12940(h) and (i). Issue and relevant questions for evaluating these separate violations are included in the second half of this section (see "Additional Questions--Separate Violation," below).

## B. Analysis of Harassment Cases

The following analytical outlines contain typical Issue and sub-Issue questions as well as sets of typical relevant questions for two categories of work-environment harassment cases.

The first outline should be used for the type of case in which the causal connection to the complainant's protected status is not disputed. It will not be in dispute where the focus and/or content of the harassing acts is the complainant's protected status.

The second outline should be used to analyze those cases in which the causal link to the complainant's protected status is disputed and must therefore be proven.

These outlines may be used to analyze harassment complaints on any basis enumerated in the FEHA, except conditional sexual harassment. Conditional sexual harassment cases should be analyzed using one or more of the five outlines found in Section 6 of this volume.

Additional issue and relevant questions are also provided to analyze whether a separate violation of the Act may have occurred; namely, whether there was a failure to take all reasonable steps to prevent harassment from occurring.

Remember that analytical outlines and lists of relevant questions are not a substitute for analytical thinking. Always ask what logically fits each case and what else logically should be considered.



## 1. Analytical Outlines

### ANALYTICAL OUTLINE 1

#### Work-Environment Harassment--"Causal Connection Not Disputed"

## II. Discrimination

Did work-environment racial (national origin, ancestry, etc.) harassment occur and is the respondent liable for it?

- A. Did actions qualifying as racial (national origin, ancestry, etc.) harassment occur?
  - 1. Do the harassing acts qualify as racial (national origin, sex, etc.) harassment in that the focus and/or content of these acts is the complainant's protected status?
  - 2. Did the incidents occur?
    - a. Does any evidence concerning the alleged incident(s) indicate that racial harassment actually occurred?
    - b. Does a pattern of similar incidents indicate that the alleged incident(s) occurred?
- B. Did the alleged incident(s) create an intimidating, oppressive, hostile, or offensive working environment or otherwise interfere with the complainant's emotional well-being or ability to perform his or her work?
- C. Is the respondent liable for the racial (national origin, religious, etc.) harassment that occurred?
  - 1. Was the harassment done by:
    - a. An agent or supervisor? or
    - b. A nonsupervisory employee?
  - 2. If done by a nonsupervisory employee, did the respondent have actual or constructive knowledge of the harassment?
    - a. Does evidence indicate actual knowledge by the respondent?
    - b. Even without actual knowledge, should the respondent have known?
      - 1) Did the respondent previously take preventive measures to keep the harassment from occurring?
      - 2) Does a pattern of prior similar incidents indicate that the respondent should have known?

- 3) Is there anything in the nature of the respondent's organization to suggest that the respondent should have known?
3. If the respondent had actual knowledge of racial (national origin, religious, etc.) harassment by the respondent's nonsupervisory employee, did the respondent take immediate and appropriate corrective action?
  - a. Did the respondent promptly, fully and fairly investigate the alleged harassment?
  - b. Did the respondent take appropriate remedial action?
  - c. Did the respondent demonstrate that it strongly disapproves of harassment and will not tolerate it in the workplace?

## ANALYTICAL OUTLINE 2

### Work-Environment Harassment--"Causal Connection Disputed"

#### II. Discrimination

Did work-environment racial (national origin, ancestry, etc.) harassment occur and is the respondent liable for it?

A. Did the harassing acts occur?

1. Does any evidence concerning the alleged incident(s) indicate that the harassment actually occurred?
2. Does a pattern of similar incidents indicate that the alleged incident(s) occurred?

B. Were the harassing acts done because of the complainant's protected status?

1. Is the respondent's or co-workers' explanation for the harassing acts factually accurate?
2. Does the respondent's or co-workers' treatment of similarly situated employees indicate that the harassing acts were done because of the complainant's protected status?
3. Is there any direct evidence to link the harassment to the complainant's protected status?
4. Is there anecdotal evidence to link the harassment to the complainant's protected status?

C. Did the alleged incident(s) create an intimidating, oppressive, hostile, or offensive working environment or otherwise interfere with the complainant's emotional well-being or ability to perform his or her work?

D. Is the respondent liable for the racial (national origin, sex, etc.) harassment that occurred?

1. Was the harassment done by:

- a. An agent or supervisor? or
- b. A nonsupervisory employee?

2. If done by a nonsupervisory employee, did the respondent have knowledge of the harassment?

- a. Does evidence indicate actual knowledge by the respondent?
- b. Even without actual knowledge, should the respondent have known?

- 1) Did the respondent previously take preventive measures to keep the harassment from occurring?
  - 2) Does a pattern of prior similar incidents indicate that the respondent should have known?
  - 3) Is there anything in the nature of the respondent's organization to suggest that the respondent should have known?
3. If the respondent had actual knowledge of racial (national origin, religious, etc.) harassment by the respondent's nonsupervisory employee, did the respondent take immediate and appropriate corrective action?
- a. Did the respondent promptly, fully and fairly investigate the alleged harassment?
  - b. Did the respondent take appropriate remedial action?
  - c. Did the respondent demonstrate that it strongly disapproves of harassment and will not tolerate it in the workplace?

Additional Issue and Relevant Questions for the Separate Violation  
of Failure to Take All Reasonable Steps to Prevent Harassment  
from Occurring

II. Discrimination

Did the respondent fail to take all reasonable steps necessary to prevent harassment from occurring?

- A. Does the respondent's response to the harassment, after gaining knowledge of it, indicate that it failed to take all reasonable steps necessary to prevent harassment from occurring?
  - 1. Did the respondent promptly, fully and fairly investigate the alleged harassment?
  - 2. Did the respondent take appropriate remedial action?
  - 3. Did the respondent demonstrate that it strongly disapproves of harassment and will not tolerate it in the workplace?
- B. Does the respondent's antiharassment policy (or lack of one) indicate that it failed to take all reasonable steps necessary to prevent harassment from occurring?
- C. Other relevant questions?

## 2. Explanation of Analytical Outlines

### ANALYTICAL OUTLINE 1 (EXPLANATION)

#### Work-Environment Harassment--"Causal Connection Not Disputed"

## II. Discrimination

### Did work-environment racial (national origin, ancestry, etc.) harassment occur and is the respondent liable for it?

In most discrimination cases, we must prove a causal connection between the adverse action in question and the complainant's protected status. In a majority of harassment cases, however, the causal link will not be a subject of inquiry, because it will not be in dispute.

This outline covers only those types of work-environment harassment cases in which the causal connection to the complainant's protected status is not disputed. The causal connection will not be in dispute in situations where the focus and/or content of the harassing acts is the complainant's protected status. For example, a Black is subjected to racially derogatory remarks. The focus and content of this verbal harassment is the complainant's race. There is no question that the harassment was done "because of" the complainant's race. Since the causal link is not in dispute, the inquiry in this variety of complaint focuses on other disputed aspects of the case, such as whether the harassment occurred at all, whether it created a hostile working environment, and whether the respondent is liable for the harassment that occurred.

The Act and Commission regulations establish a three-part legal standard for work-environment harassment cases:

#### A. Did actions qualifying as racial (national origin, ancestry, etc.) harassment occur?

This first element of the legal standard has two parts. First the standard inquires about the focus and/or content of the harassing acts. Second, it asks whether the alleged harassment actually occurred in fact.

##### 1. Do the harassing acts qualify as racial (national origin, ancestry, etc.) harassment in that the focus and/or content of these acts is the complainant's protected status?

In order for the adverse actions in question to qualify as unlawful harassment, they must first be "harassing" acts, that is they must be the type of behavior envisioned by the FEHA, Commission regulations, and Commission precedential decisions to constitute harassment. Harassment by definition is behavior that threatens, intimidates, humiliates, embarrasses, or irritates. Commission regulations Section 7287.6(b) define "harassment" as including, but not limited, to the following:

- Verbal harassment, e.g., epithets, derogatory comments or slurs;
- Physical harassment, e.g., assault, impeding or blocking movement, or any physical interference with normal work or movement;
- Visual harassment, e.g., derogatory posters, cartoons; or drawings; or
- Sexual favors, e.g., unwanted sexual advances which condition an employment benefit upon an exchange of sexual favors. (Sexual harassment cases, both "conditional" and "work-environment," are discussed in the next section.)

NOTE: The above is only a partial list of examples. There may be many other types of adverse actions that will also constitute harassment. (See the next section for a partial list of behavior that will constitute "sexual" harassment.)

NOTE: Certain adverse actions, such as a simple termination or a failure to hire or promote clearly will not constitute harassment.

Next, even if the adverse actions are "harassing" acts, they must also qualify as "racial" ("national origin," "religious," etc.) harassment in order to be unlawful under the Act. Harassment will so qualify if the focus and/or content of the harassment is the complainant's protected status. For example, the content and focus of racially derogatory remarks is race. The content and focus of "sexist" remarks is sex. Since the causal link in cases involving this type of harassment will not be in dispute, there is no need to prove the causal connection between the complainant's protected status and the harassing acts. The very nature of the harassment, itself, tells us that the harassment is being done "because" of the complainant's protected status. Thus, this type of harassment is automatically "racial" ("national origin", "religious", etc.) harassment. The following examples illustrate further the type of harassment where the focus and/or content of the behavior is the complainant's protected status:

Example 1:

In Marriott Hotel FEHC Dec. No. 83-10, a Mexican-American Complainant was subjected to derogatory epithets, comments, and slurs by her co-workers. Complainant was called a "slimy Mexican," "thieving Mexican," "dirty Mexican," "f... wetback," and "you damned Mexican." The content and focus of this verbal harassment is the Complainant's ancestry. Thus, it is clear that the harassment was being done "because of" the Complainant's

protected status. This type of behavior, then, is automatically "ancestry" harassment.

Example 2:

In City of Corcoran Police Department FEHC Dec. No. 80-31, Complainant, a Black police officer, was called a "nigger," "Black bastard," "nigger son-of-a-bitch Black bastard," and a "spade" by his co-officers, his Sergeant, and by the Chief of Police. The focus and content of this verbal harassment is the Complainant's race. There is no dispute that these harassing acts were done "because of" the Complainant's race and that these adverse actions constitute "racial" harassment.

Example 3:

In Hubacher Cadillac FEHC Dec. No. 81-01, Complainant, the only female carhop, was subjected to "sexist" comments by the service manager. He called her a "dumb girl," and told her repeatedly that she was the "wrong sex" and that "as a female, she did not blend into the workplace." It is clear that the focus of this harassment is the Complainant's sex, and there is no dispute that the manager's behavior qualifies as "sex" harassment.

Example 4:

A Black is subjected to visual harassment in the form of racially derogatory cartoons posted on the company bulletin board. The cartoons depict stereotyped figures of Blacks wearing overalls, walking barefooted, and eating watermelon. There is no dispute that the content of the cartoons is the Complainant's protected status and that this type of visual harassment is "racial" harassment.

In practically all harassment cases of this type, the focus and/or content of the harassing acts will be explicitly race, national origin, or some other protected basis, and there will be no question that the harassment qualifies as "racial" ("national origin," "religious," etc.) harassment. In a small number of other cases, however, a respondent may dispute that the adverse actions in question were "racial" in focus or content. If this dispute arises, remember that it does not matter if the harasser or anyone else thinks that the conduct is "racial." The legal standard looks at the victim's perception and the manner in which he is affected by the harassment. Thus, where a Black complainant feels that particular events or conduct constitute racial harassment, the only real disputes will be whether the harassment did occur and whether the respondent is liable for it (see Fresno Hilton Hotel FEHC Dec. No. 84-03, p. 29).

If, however, the focus and/or content of the harassing acts is truly ambiguous, consult Legal for an evaluation. Be sure to



present Legal with a detailed account of all the incidents and an explanation of why the complainant thought the harassment was racial, ancestry-based, etc.

(In cases where the harassing acts are "neutral," that is, the acts themselves do not tell us what the basis is, we will have to prove a causal connection between the complainant's protected status and the harassment. If a case involves this type of "neutral" harassment, be sure to use Analytical Outline No. 2, "Work-Environment Harassment--Causal Connection Disputed.")

2. Did the incidents occur?

Respondents usually dispute this part of the legal standard and claim that no harassment occurred at all. The following two relevant questions represent typical kinds of evidence that may be used to evaluate whether the harassment actually occurred.

- a. Does any evidence concerning the alleged incident(s) indicate that racial (national origin, ancestry, sex, etc.) harassment actually occurred?

Many different types of evidence may exist to indicate whether the alleged incident(s) occurred: direct, anecdotal, documentary, witnesses to the incident, the complainant's statement and the harasser's statement, and any other evidence.

Begin the investigation with the statements of the complainant and the harasser.

NOTE: The Commission has ruled in numerous decisions that one witness' testimony is sufficient to establish a particular fact. Therefore, two opposing statements by the complainant and the harasser or other witnesses will not necessarily cancel each other out but must be weighed against one another in terms of the credence an Administrative Law Judge and the Commission would give them.

To assess credibility, in addition to the usual factors of bias and prejudice and demeanor and appearance (see discussion "What is Evidence" in Chapter III, Volume I of this manual), the Commission will also examine each person's testimony for logical, internal consistency and amount of detail. The more consistent and detailed the statement, the more credible the testimony. The more vague and contradictory a statement, the less credible the witness. The Commission will also evaluate consistency by looking at other persons' accounts of the same circumstances.

Consider corroborating evidence. Were there witnesses to the harassing incidents? Did the complainant tell someone, such as a friend, relative, or co-worker about the incidents at the time they occurred or at a later date?

NOTE: In many types of harassment complaints, there may not be any witnesses to the incidents. If this is the case, establishing whether the harassment occurred will depend on the relative credibility of the complainant and the harasser alone.

Is there corroborating documentary evidence, such as a chronology of events kept by the complainant, a diary, letters from the complainant to the respondent documenting the incidents, or any other relevant document? If the complainant was forced to resign and filed for unemployment insurance, what did he or she tell the EDD case worker?

Did management know of the harassment? How and when did it gain such knowledge? Did the complainant tell a manager, supervisor, or a union representative? Did the union representative tell management? After gaining knowledge, what steps, if any, did management take? Did it investigate? Who conducted the investigation? Was it a partial or full investigation? Is there any documentation that records any part of the investigation and/or its results? Did the respondent take any steps as a result of the investigation? If so, what were they?

NOTE: In addition to corroborating the complainant's testimony that the harassment did occur, evidence of management's response to complaints of harassment may also be relevant to establishing whether separate violations of Sections 12940(h) and (i) of the FEHA may have occurred. These sections establish a respondent's duty to take all reasonable steps to prevent harassment from occurring. A failure to investigate may be a failure by the respondent to carry out this duty to prevent harassment, since a full investigation of complaints is a good way to prevent future misconduct. See discussion of "Additional Questions--Separate Violation," below.)

When reporting the evidence, start with a chronology of the incidents of harassment and of management's response. When and where did each one occur? Who did them? What was said or done? Who, if anybody, witnessed each incident? List the corroborating evidence, if any, for each incident.

- b. Does a pattern of similar incidents indicate that the alleged incident(s) occurred?

This question inquires whether the harasser is inclined toward the type of behavior in question. If there is evidence that this individual has harassed other Blacks (Hispanics, Asians, etc.) in the same or similar manner, this would tend to support the complainant's assertion that the alleged incident did occur.

Gather the evidence by interviewing Black (Hispanic, Asian, etc.) employees (both past and present) who have had contact with the harasser as well as some other non-Black employees who may have knowledge of any incidents of others being harassed. You can do this by obtaining the last known address and telephone number of each witness from the complainant. If the complainant does not have this information, ask the respondent for it in the service letter, or in an interrogatory, request to produce, or a subpoena. Whenever possible, it is best to interview all witnesses away from the worksite.

NOTE: This type of evidence may also be useful in impeaching the harasser's credibility.

- B. Did the alleged incident(s) create an intimidating, oppressive, hostile, or offensive working environment or otherwise interfere with the complainant's emotional well-being or ability to perform his or her work?

Even if it is established that acts qualifying as racial (national origin, religious, etc.) harassment actually did occur, the inquiry does not end there. We must go on to show that the harassment created an intimidating, oppressive, hostile or offensive working environment or otherwise interfered with the complainant's emotional well-being or ability to perform his or her work (see Fresno Hilton Hotel FEHC Dec. No. 84-03, p. 32). This second element of the legal standard will be satisfied if the harassment tainted the work atmosphere enough to bring emotional distress to the complainant. In order to evaluate this, we must look at the effect of the harassment on the complainant's emotional well-being and at the nature and extent of the harassment itself.

#### Effect on Complainant's Emotional Well-Being

As a measure of the hostility of the work environment, the Commission will examine the testimony of the complainant regarding how the harassment affected his or her sense of emotional well-being. Did the harassment make the complainant feel emotionally distressed? Did he or she feel humiliated, ashamed, angry, frustrated, fearful, depressed, threatened, physically distressed, or otherwise emotionally upset? Were there physical symptoms, such as indigestion, insomnia, nervousness, hair or weight loss, etc.? Did the harassment upset the complainant so

that his or her work was affected, he or she was unable to work, or was forced to quit?

Did the complainant tell a supervisor or management and nothing was done or the response was inadequate? Did this make the complainant feel helpless, frustrated, or angry? Did the complainant know that others were being harassed and that management knew but did not respond or responded inadequately? Did this upset the complainant? Did he or she complain and co-workers become hostile? Failure of management to correct harassment and hostile responses from co-workers can add to the oppressive nature of a work atmosphere. Remember that in determining whether a work environment was made sufficiently hostile, the Commission will give great weight to the complainant's own perception of how the harassment affected him or her.

Respondents often argue that the complainant is not the type of person who would be offended by the conduct in question or that since the complainant did not mind such conduct from others, he or she would not be offended by the same conduct from the harasser. The Commission rejects both assertions. It will not permit evidence as to the nature of the complainant's character. It also rejects the stereotype that Blacks, for example, called a racially derogatory name by other Blacks would not be offended if someone non-Black used the same derogatory term. Again, it does not matter if the harasser or someone else was not offended. The focus of the inquiry is on the complainant's perception of the harassment. (Fresno Hilton Hotel, p. 23.)

NOTE: Evidence of how the harassment affected the complainant's emotional well-being is also necessary to establishing compensatory damages for emotional injury under Issue IV, Remedy."

Respondents also often argue that the complainant could not possibly have been upset by the harassment because he or she participated in it or because it was mutual. If this problem arises, examine the fact situation of each disputed incident carefully to determine the extent and content of any alleged participation by the complainant. Remember that victims of harassment sometimes may appear to be participating when they are merely putting up with the harassing acts or reacting nervously to them. For example, laughing in reaction to harassment does not necessarily mean participation or that the complainant did not find the conduct offensive. The complainant may have been laughing out of nervousness or because he or she was caught off guard or because he or she did not feel comfortable to respond with anger or some other way. If situations arise, however, where there does appear to be actual participation, be sure to consult Legal for an evaluation.

### Nature of the Incidents

The Commission will also look objectively at the nature of the harassment. How offensive, how intimidating, hostile, oppressive, or threatening were the harassing acts? Again, it is important to be sensitive to the complainant's perception of these situations. What Blacks, for example, consider offensive behavior is often not viewed the same way by others who are not Black. The legal standard asks whether the complainant was intimidated or offended not whether somebody else of a different protected group would have been. Remember that the complainant has a statutory right to a discrimination-free work environment.

Where did the harassment take place? Did it occur at the complainant's place of employment? If not, was it somehow brought into the employment atmosphere? The harassing conduct may, and often does, occur at the workplace, but it need not. Conduct perpetrated by an agent, supervisor, or co-worker, which occurs elsewhere but is somehow work-related, may also result in the creation of a hostile or oppressive work environment (Fresno Hilton Hotel, p. 32). For example, if a supervisor makes racially derogatory remarks directed at the complainant away from the workplace, the very nature of the supervisor's position of authority may automatically bring the incident into the employment atmosphere.

### Extent of the Incidents

The Commission will also look objectively at the extent of the incidents. Were the harassing acts isolated ones or continuing? One incident may not be enough, but it may still qualify if it is sufficiently offensive (see Huncot Properties and Charles Thomas, FEHC Dec. No. 88-21, p. 9). On the other hand, a series of two or more not-so-offensive incidents taken together will be sufficient. Further, harassment may occur over a short period of time or continue for several years. Remember that a racially derogatory comment or other harassing act made in a few seconds can be just as offensive as one made at greater length (Donald Schriver, Inc. FEHC Dec. No. 84-07, p. 11).

Remember, however, that while the Commission will look objectively at the nature and extent of the incidents, it has indicated that in determining whether the work environment was made sufficiently hostile, it will place greater emphasis on the effect of the harassment on the complainant's emotional well-being.

- C. Is the respondent liable for the racial (national origin, religious, etc.) harassment that occurred?

Even if the evidence shows that work-environment racial (national origin, ancestry, etc.) harassment did occur, the respondent may not be liable for it. In order to determine the respondent's liability, we must ask the following questions:

1. Was the harassment done by:

a. An agent or supervisor?

In all cases under the FEH Act, a respondent is strictly liable for the unlawful acts of its agents or supervisors when they are acting within the scope of their employment.

This is true for harassment cases as well (see Section 12940(h) of the Act and Commission regulations Section 7287.6(b)(2)). Therefore, if the acts of harassment were committed by an agent or supervisor, the respondent is automatically liable even if the respondent had no knowledge of the incidents. There is no affirmative defense available and, therefore, no need to ask any further questions other than those concerning remedy (Issue IV). If the incidents of harassment were not committed by an agent or supervisor of the respondent, then proceed to the next question.<sup>2</sup>

OR

b. A nonsupervisory employee?

In most types of discrimination cases, it is a supervisor or agent who commits the unlawful acts. In harassment cases, however, co-workers are often the harassers. If co-workers are the harassers, special liability rules

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<sup>2</sup>Remember that in addition to finding the respondent as a business generally liable for the unlawful conduct, the Commission may also hold certain individuals liable as separately named respondents if these individuals qualify as "agent-employers" or as "any other person" under Government Code Section 12940(h). (The legal standard for who qualifies as an "agent-employer" is discussed in the "Jurisdiction" section of this manual.) In the past, in decisions involving sexual harassment, the Commission found those persons individually liable as "agent-employers" who were supervisors or managers who themselves committed the unlawful harassment. (See Bee Hive Answering Service FEHC Dec. No. 84-16, pp. 14-16; La Victoria Tortilleria FEHC Dec. No. 85-04, p. 19; Del Mar Avionics FEHC Dec. No. 85-19, pp. 24-25; Guill, Blankenbaker and Lawson, et al. FEHC Dec. No. 89-15, pp. 16-17; and Barbara Rosenberg, individually and dba TMC Motorsports; Tim Martin as an employer and individual FEHC Dec. No. 90-09, p.10.) The Commission also found managers individually liable as "agent-employers" who participated in the unlawful conduct or who had actual knowledge of it and took no corrective action. (See Hart and Starkey, Inc. FEHC Dec. No. 84-23, pp. 17-19.) Note that individual liability is not limited to sexual harassment cases. If the proper fact situation exists, it is possible that the Commission may find a person who qualifies as an "agent-employer" individually liable in any type of discrimination case. In addition to finding supervisor harassers personally liable as "agent-employers", Commission decisions have held that harassers are also liable as "any other person" under the language of Government Code Section 12940(h). In fact, in the Madera County precedential decision, FEHC Dec. No. 90-03, p. 25, the Commission found a non-supervisory harasser personally liable under the "any person" language.

apply. If these rules are met, the respondent may still be liable even if a mere employee was the harasser. Therefore, if the harassment was done by a nonsupervisory employee, go on to the next question.

2. If done by a nonsupervisory employee, did the respondent have knowledge of the harassment?

Section 12940(h) of the Act, and Commission regulations Section 7287.6(b)(3) establish the rule that the respondent will be liable for the harassing acts of nonsupervisory employees if the respondent, its agents, or supervisors had actual or "constructive" knowledge ("respondent should have known") of the incidents of harassment. Therefore, the following segments of evidence must be considered where the harassment was done by a nonsupervisory employee.

- a. Does evidence indicate actual knowledge by the respondent?

Who of respondent's agents, supervisors, etc., knew of the harassment? How did they find out? Did the complainant tell a supervisor, agent, co-worker, union representative, or someone else? Did this person tell the respondent or respondent's agent? Was the respondent or its supervisor present during any of the incidents?

Note: Under Commission regulations Section 7287.6(b)(4), an employee is not required to inform the respondent of harassment by a nonsupervisory employee and failure to do so will not limit the respondent's liability. In practice, however, it is always better for an employee to inform the respondent. In this way, the respondent will have actual knowledge and will be liable unless it took immediate and appropriate corrective action.

If evidence indicates that the respondent had actual knowledge of the harassment by a nonsupervisory employee, proceed to question C.3., below. If the respondent did not have actual knowledge, go on to the next question.

- b. Even without actual knowledge, should the respondent have known?

The following three segments of evidence have a bearing on whether the respondent had constructive knowledge ("should have known") of the incidents of racial (national origin, religious, etc.) harassment. If it can be proven that the respondent should have known, the respondent will be liable. Nothing will limit liability.

- 1) Did the respondent previously take preventive measures to keep the racial (national origin, sex, etc.) harassment from occurring?

Sections 12940(h) and (i) of the FEHA require that respondents take all reasonable steps to prevent harassment from occurring. According to Commission regulations Section 7287.6(b)(3), knowledge will automatically be imputed to the respondent, if the respondent did not take such preventative measures. The regulations list some types of measures as examples, such as affirmatively raising the subject of harassment, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under California law, and developing methods to sensitize all concerned.

If the respondent did take preventive measures, we need to evaluate them for adequacy. When were they taken? What is the nature of them? Were they enforced? However, even if the answer to this question is yes, the respondent did take adequate preventative measures, it may still be possible to demonstrate constructive knowledge. Therefore, proceed to the next two questions since other circumstances might demonstrate that the respondent should have known despite its preventive measures.

- 2) Does a pattern of prior similar incidents indicate that the respondent should have known?

Has the same harasser(s) committed the same or similar acts of harassment before? If so, did the respondent take any corrective action? The evidence from question A.2.b., above, will also be relevant here.

- 3) Is there anything in the nature of the respondent's organization to suggest that the respondent should have known?

Were any agents or supervisors of the respondent in a position to know or supposed to know what was happening in the workplace (by virtue of their authority, position in the chain of command, physical location in the workplace, or in any other way)?

3. If the respondent had actual knowledge of racial (national origin, religious, sex, etc.) harassment by the respondent's nonsupervisory employee, did the respondent take immediate and appropriate corrective action?

Section 12940(h) of the Act and Commission regulations Section 7287.6(b)(3) provide a limitation on liability that a respondent who did have actual knowledge of harassment by a



nonsupervisory employee, will, nevertheless, not be liable for the harassment if the respondent took immediate and appropriate corrective action. The corrective action, however, must be evaluated. Who knew of the harassment? What steps did they take when they found out about it? Did they investigate the incidents? Did they take disciplinary action against the harasser(s)? Was the corrective action immediate and appropriate? Did the respondent follow through and enforce it? Did it correct the situation? If not, the respondent may still be fully liable for the harassment that occurred.

The Commission has given us some guidance regarding the action it expects employers to take when they have actual knowledge of harassment. In its precedential decision, Del Mar Avionics (pp. 32-33), the Commission discussed the sufficiency of the Respondent's investigation of the Complainant's allegations of racial and sexual harassment. Though Del Mar Avionics entailed harassment by a supervisor, an employer's investigation of non-supervisory harassment should follow similar guidelines.

In the Del Mar Avionics decision, the Commission indicated that an employer is expected to:

- a. Initiate an immediate investigation;
- b. Conduct an investigation that is thorough and fair; and
- c. Conduct adequate follow-through on information gathered during the investigation. For instance, the Commission found that the Respondent's investigators could have talked to all, not just some, of the women who were supervised by the harasser; that the Respondent's investigation could have tracked down a rumor that another female employee had a similar complaint of harassment against the Complainant's supervisor.

Additionally, the Commission found that the Respondent could have temporarily removed the Complainant from the harasser's supervision, and chastised (or at the very least, counseled) the harasser.

While the Del Mar Avionics guidelines should be referenced when evaluating the adequacy of corrective action, the specific form of these steps will vary with the circumstance of each case. The ultimate test in every case, however, will be whether the employer acted promptly, vigorously, and visibly, thereby demonstrating that it does not tolerate, and strongly disapproves of harassment in the workplace. These concerns are reflected in the following questions:

- a. Did the respondent promptly, fully and fairly investigate the alleged harassment?

- b. Did the respondent take appropriate remedial action?
- c. Did the respondent demonstrate that it strongly disapproves of harassment and does not tolerate it in the workplace?

If the respondent had actual knowledge of the harassment by a nonsupervisory employee and took no corrective action, the respondent will be liable. Remember that the special limitation on liability applies only where a nonsupervisory employee is the harasser and the respondent had actual knowledge.

NOTE: Under Commission regulations, failure to notify an employer of sexual harassment by a nonsupervisory employee does not limit the employer's liability.)

Remember also that a failure to investigate and to take appropriate corrective action may be a separate violation of Sections 12940(h) and (i) of the FEHA, which require an employer to take all reasonable steps to prevent harassment from occurring. See discussion "Additional Questions-- Separate Violation" below.

## ANALYTICAL OUTLINE 2 (EXPLANATION)

### Work-Environment Harassment--"Causal Connection Disputed"

#### II. Discrimination

Did work-environment racial (national origin, ancestry, etc.) harassment occur and is the respondent liable for it?

This outline covers only those types of work-environment harassment cases in which the causal connection to the complainant's protected status (race, ancestry, etc.) is disputed. It will be in dispute where the harassing acts are "neutral," that is, the content and/or focus of these acts does not tell us what the protected basis is. If such "neutral" harassment is present, we must prove that it was done "because of" the complainant's race (national origin, religion, etc.).

#### Example 1:

Non-Hispanic co-workers provoke a fight with a Mexican-American Complainant. There is nothing in the nature of the harassing act, itself, that indicates that the fight was provoked "because of" the Complainant's ancestry. A causal connection to the Complainant's ancestry must be proven in order for this physical harassment to be unlawful ancestry harassment.

#### Example 2:

A female Complainant believes that she is being singled out for closer supervision because of her sex. She is watched closely, written up a lot, and constantly criticized by her supervisor. There is nothing, however, in the nature of the harassing acts, themselves, to suggest that they are being done "because of" her sex. A causal connection must be proven in order for sex harassment to exist.

NOTE: This outline differs from Analytical Outline No. 1 only with regard to the first element of the legal standard. Thus, Outline 2, once it has been shown that the harassing acts were done "because of" the complainant's race (national origin, religion, etc.), focuses on the same disputed areas that were covered in Outline 1, namely, whether the harassment occurred at all, whether it created a hostile working environment, and whether the respondent is liable for the harassment that occurred.

#### A. Did the harassing acts occur?

Before we inquire about whether a causal connection between the complainant's protected status and the harassing acts exists, there must of course have been harassment to begin with. Respondents usually dispute this part of the legal standard and claim that no harassment occurred at all. The following relevant questions represent typical kinds of evidence that may be used to evaluate whether the harassment did in fact occur.

1. Does any evidence concerning the alleged incident(s) indicate that the harassment actually occurred?

Refer to pp. 17-19, above, II.A.2.a., Analytical Outline No. 1.

2. Does a pattern of similar incidents indicate that the alleged incident(s) occurred?

Refer to p. 19, above, II.A.2.b., Analytical Outline No. 1.

- B. Were the harassing actions done because of the complainant's protected status (race, national origin, religion, etc.)?

If the harassing acts did occur, we can move on to evidence showing there was (or was not) a causal connection between the complainant's protected status and the harassing adverse actions. The next four questions represent evidence from which we can draw an inference as to whether the complainant's race (color, sex, etc.) was a factor in motivating the harasser(s) in question to take the harassing actions against the complainant. If the complainant's protected status was a factor, that is sufficient to prove the causal connection.

1. Is the respondent's or co-workers' explanation for the harassing actions factually accurate?

Just as in a standard termination case, the respondent will usually deny that the alleged harassing acts were taken because of the complainant's protected status and will assert instead a rebuttal; a claim that some other nondiscriminatory reason caused the actions to be taken. For example, a Black complainant claims that he was being singled out for closer supervision because of his race. The respondent denies this claim and asserts the rebuttal that the complainant was being closely supervised because he had poor performance. The investigation should identify each rebuttal and check each aspect of it for factual accuracy. In this example, we would check to see whether the complainant did in fact have a poor performance record and whether the respondent relied on this information when making its decision to supervise the complainant closely. Using this true/false test of the respondent's rebuttal, we can draw an inference as to whether the respondent was motivated (or not) to discriminate. If the respondent's explanation for the harassing acts is false, we can draw an inference that the respondent did the harassment because of the complainant's protected status. On the other hand, if the respondent's reasons are factually true, we cannot draw a discriminatory inference from this segment of evidence, although discrimination may still be proven by means of other evidence.

Since co-workers are often the harassers, we may have to test their explanation for factual accuracy also. For example,

White co-workers fill a newly-hired Black firefighter's boots with water. The complainant claims that this is being done because of his race. Co-workers claim that the water got in his boots accidentally. The investigation should check each aspect of this rebuttal to see whether it is true. If the facts indicate that it was not an accident, we would draw the inference that the water was put there because of the complainant's race. Of course, if co-workers deny that they committed the harassing acts, there will be no rebuttal explanation to test and this segment of evidence will not be useful.

2. Does the respondent's or co-workers' treatment of similarly situated employees indicate that the harassing acts were done because of the complainant's protected status?

The evidence under this relevant question looks at the respondent's or co-workers' treatment of other groups of similarly situated persons. From this evidence, we can draw an inference about the respondent's or co-workers' motives for their treatment of the complainant.

Respondent or its agent or supervisor is the harasser:

If the respondent or its agent or supervisor is the harasser, we will look at what happened to others under the same decision-maker who did what the respondent claims the complainant did. The respondent's rebuttal usually claims, for example, that the complainant was more closely supervised, written up a lot, or verbally criticized because the complainant did something (e.g., did poor work) that warrants such disciplinary actions. This segment of evidence involves the respondent's treatment of other persons who did the same or similar thing (e.g., did poor work). If these persons are not Black and are under the authority of the same harasser who made the decision to take the harassing adverse actions against the complainant, their treatment by the respondent will permit us to infer much about the respondent's motives for its treatment of complainant. Evidence that these persons were not subjected to the same types of disciplinary actions that the complainant was tends to demonstrate that the complainant was subjected to these harassing adverse actions because of his protected status. Evidence that these persons were subjected to the same disciplinary actions, on the other hand, tends to demonstrate that these actions were taken against the complainant because of the nondiscriminatory reason that respondent asserts (e.g., complainant did poor work).

As with any disparate treatment evidence, approach this evidence in two steps:

- a. Determine who did the harassing acts and who made the decision to take the alleged harassing adverse actions against the complainant. Decide who is similarly situated

by determining which, if any, persons are subject to the same decision-making authority as the complainant. Then determine which of these persons committed the same or a similar infraction (according to the respondent's work rules) as the complainant. If the harasser and the decision-maker are not the same person, did the harasser have some influence on the decision-making process? If so, the scope of authority may be broader and more people may be similarly situated. Determine the protected status of these similarly situated individuals.

- b. Next, examine how the respondent treated these similarly situated persons. Ask whether these persons were given the same treatment as the complainant or whether a less adverse action or no action was taken. (See relevant question C on the Analytical Outline for Termination Cases, Section 1 of Chapter VII for additional discussion of disparate treatment evidence.)

#### Co-workers are the harassers

Quite often co-workers are the harassers. If so, we may also use disparate treatment evidence to tell us about the motivation of co-workers to discriminate or not. If co-workers have a nondiscriminatory explanation or rebuttal for why the harassing acts were done, we would test this explanation by examining how these co-workers treat other co-workers who are similarly situated to the complainant. First, what is the make-up by protected group of the co-workers with whom the harassers come in contact? How do these harassers treat non-Blacks who did the same thing the complainant allegedly did? For example, a newly hired Black firefighter has his boots filled with water. White co-workers claim that they do this to all new firefighters. Check to see if newly-hired non-Black firefighters have had the same or similar things happen to them. In another example, White co-workers provoke a fight with a Black complainant. The co-workers claim that the Black insulted a White co-worker and that the fight had nothing to do with his race. Check to see how these White co-workers react to non-Blacks who insult them. If these White co-workers treat the Black complainant differently from other non-Blacks, we can draw the inference that the harassing adverse actions were done because of the complainant's race.

3. Is there any direct evidence to link the harassment to the complainant's protected status?

Direct evidence demonstrates the answer to the "causal connection" question ("because of") directly. For example, co-workers' statements that they slashed a Black worker's tires because they did not want to work with Blacks tell us directly that the harassment was done "because of" the complainant's race. Always check for this very powerful evidence, even though you may not find it very often.

4. Is there any anecdotal evidence to link the harassment to the complainant's protected status?

Anecdotal evidence about particular remarks, events, or conduct may demonstrate that the harasser (whether respondent's agent or co-workers) was biased against the complainant because of his protected status. Approach this evidence in two steps: First, make sure that the supervisor or manager to whom the evidence applies either was the harasser or played some role in the decision to take the harassing adverse action against the complainant. If the evidence applies to co-workers, make sure that these co-workers are the harassers in question. Second, determine whether the claimed events (the remarks, conduct, etc.) really occurred, and whether they do in fact show bias against the complainant because of his or her protected status. Remember that the kind of anecdotal evidence to be evaluated under this question (remarks, conduct, etc.) is separate from the harassing adverse actions, themselves.

NOTE: In some cases remarks or conduct that is explicitly "racial," "religious," etc., may also constitute work-environment harassment and should have already been analyzed using Analytical Outline No. 1.

If the evidence under questions B.1 through 4 shows that a causal connection between the harassing acts and the complainants's protected status exists, proceed to the next element of the legal standard under question C, below.

C. Did the alleged incident(s) create an intimidating, oppressive, hostile, or offensive working environment or otherwise interfere with the complainant's emotional well-being or ability to perform his or her work?

Refer to pp. 19-21, above, II.B., Analytical Outline No. 1.

D. Is the respondent liable for the racial (national origin, religious, etc.) harassment that occurred?

Refer to p. 21, above, II.C., Analytical Outline No.1.

1. Was the harassment done by:

a. An agent or supervisor?

Refer to pp. 21-22, above, II.C.1.a., Analytical Outline No. 1.

OR

b. A nonsupervisory employee?

Refer to p. 22, above, II.C.1.b., Analytical Outline No. 1.

2. If done by a nonsupervisory employee, did the respondent have knowledge of the harassment?

Refer to pp. 22-23, above, II.C.2., Analytical Outline No. 1.

a. Does evidence indicate actual knowledge by the respondent?

Refer to p. 23, above, II.C.2.a., Analytical Outline No. 1.

b. Even without actual knowledge, should the respondent have known?

Refer to p. 23, above, II.C.2.b., Analytical Outline No. 1.

1) Did the respondent previously take preventive measures to keep the racial (national origin, sex, etc.) harassment from occurring?

Refer to pp. 23-24, above, II.C.2.b.1), Analytical Outline No. 1.

2) Does a pattern of prior similar incidents indicate that the respondent should have known?

Refer to p. 24, above, II.C.2.b.(2), Analytical Outline No. 1.

3) Is there anything in the nature of the respondent's organization to suggest that the respondent should have known?

Refer to p. 24, above, II.C.2.b.(3), Analytical Outline No. 1.

3. If the respondent had actual knowledge of racial (national origin, religious, sex, etc.) harassment by the respondent's nonsupervisory employee, did the respondent take immediate and appropriate corrective action?

Refer to pp. 24-26, above, II.C.3., Analytical Outline No. 1.



Explanation of Additional Issue and Relevant Questions for the  
Separate Violation of Failure to Take All Reasonable Steps to  
Prevent Harassment From Occurring

II. Discrimination

Did the respondent fail to take all reasonable steps necessary to  
prevent harassment from occurring?

Sections 12940(h) and (i) of the FEHA establish a respondent's statutory duty to take all reasonable steps necessary to prevent harassment and discrimination from occurring. A failure to fulfill this duty is a separate violation of the Act. In harassment cases, certain types of actions or inaction by the respondent may constitute a failure to carry out this statutory duty to prevent harassment. Since such actions may be a separate violation of the Act, this area needs to be investigated. (If you have already investigated evidence represented by the questions listed below, simply write the question and refer back to the place where the information has already been discussed. Do not repeat information unnecessarily.)

- A. Does the respondent's response to the harassment, after gaining knowledge of it, indicate that it failed to take all reasonable steps necessary to prevent harassment from occurring?

Did the respondent:

1. Immediately, fully and fairly investigate?
2. Take appropriate remedial action?
3. Demonstrate that it strongly disapproves of harassment and does not tolerate it in the workplace?

A fundamental part of the duty to prevent harassment is the obligation to make prompt, full, and fair investigation of all harassment complaints, regardless of whether any harassment is found to have occurred in a given incident. A failure to investigate may be a violation of Sections 12940(h) and (i) since a full investigation is a powerful means of deterring future misconduct. (Del Mar Avionics FEHC Dec. No. 85-19, p. 32.) A respondent's response to complaints of harassment, therefore, must be examined.

When and how did the respondent gain knowledge of the harassment? What steps, if any, did it then take? Did it investigate? Who conducted the investigation? Was it a full or partial investigation? Who was interviewed or contacted? Is there any documentation of the investigation or of its findings? Did the respondent take any steps as a result of the investigation? If so, what were they? Did the respondent repudiate the harassment by redressing the harm done to the complainant and by punishing or discharging the harasser? (This evidence may have already been discussed under questions A.2.a and C.3 on Analytical Outline No.

1 and under questions A.1 and D.3 on Analytical Outline No. 2. If so, simply refer to it here.)

- B. Does the respondent's antiharassment policy (or lack of one) indicate that it failed to take all reasonable steps necessary to prevent harassment from occurring?

Failure to take other preventative measures, such as establishing an antiharassment policy, may also constitute a violation of Sections 12940(h) and (i).

Does the respondent have an antiharassment policy? When did it go into effect? When was it disseminated? Were managers and employees trained regarding the contents of this policy? Obtain a copy of the policy and evaluate it for adequacy. (This evidence may have already been discussed under questions C.2.b.1) on Analytical Outline No. 1 and under questions D.2.b.1) on Analytical Outline No. 2. If so, simply refer to it here.)

- C. Other relevant questions?

Is there anything else that the respondent did or failed to do that might constitute a failure to take reasonable preventative measures? Did the respondent, for example, knowingly hire someone whom it knew to be a harasser or take actions to encourage harassment? If so, these actions by the respondent may be a separate violation of the Act.

C. The Law: Sources of the Legal Standards for Harassment Cases

1. Statute and Regulations

FEHA (Government Code) Sections 12940(h) and (i)

Commission regulations Sections 7287.6(b), 7291.1(f)(1), and 7286.5(f), (f)(3), and 7286.6(b)

2. Precedential Decisions

DFEH v. City of Corcoran Police Department (Simpson) FEHC Dec. No. 80-31. Work-environment racial harassment - racial slurs by co-workers, supervisors, and management; disparate supervision; constructive discharge.

DFEH v. Marriott Hotel (Viodes) FEHC Dec. No. 83-10. Work-environment harassment on basis of Mexican-American ancestry - verbal slurs by co-workers, actual knowledge by respondent and no corrective action; constructive discharge. In absence of actual knowledge, knowledge will be imputed if Respondent failed to take all reasonable steps to prevent harassment from occurring.

DFEH v. Fresno County (Batchelor) FEHC Dec. No. 84-27. Work-environment harassment on basis of physical handicap (smoke sensitivity) - supervisors sought to worsen complainant's situation and to cause conflict with co-workers by not accommodating complainant; failure to accommodate physical handicap.

DFEH V. Del Mar Avionics and Coy Wall, its Supervisor and Agent (Thompkins) FEHC Dec. No. 85-19. Work-environment racial (Black) and sexual harassment - racial and sexual comments, threats, write-ups, assignment changes; constructive discharge; ratification of unlawful conduct by managing agent of corporation; failure to take corrective action as a separate violation.

DFEH v. Community Hospital of San Gabriel (Quan) FEHC Dec. No. 86-08. Work-environment ancestry (Asian) harassment - verbal slurs by supervisors outside Complainant's department. Respondent strictly liable for supervisor harassment, even if supervisor is not victim's supervisor. Eyewitness corroboration not necessary to prove harassment.

DFEH v. Right Way Homes, Inc. aka Homefinders; Jerry Wilkerson As An Individual and Managing Agent (McKinney R. and M. Martin) FEHC Dec. No. 90-16. Work environment racial (Black) harassment over a two to three-year period - verbal slurs, jokes, and derogatory comments by supervisor/Executive Director. Additional violation of Government Code Sections 12940(h) and (i) demonstrated by absence of anti-harassment policy and supervisors' inadequate response to employees' protests. Highest compensatory damage award in a racial harassment case. FEHC ordered workplace be monitored for three years due to egregiousness of racial harassment and Respondent's persistence despite numerous complaints. Respondent licensed by California Department of Social Services; pursuant to Government Code 12970(b),

FEHC ordered that licensing agency be provided with a copy of decision.

- Sexual Harassment (see next section for more detail)

DFEH v. Hubacher Cadillac/Saab, Inc. (Kendall) FEHC Dec. No. 81-01.

DFEH v. Ambylou Enterprises, Inc. (Wilson) FEHC Dec. No. 82-06.

DFEH v. Fresno Hilton Hotel (Burns) FEHC Dec. No. 84-03.

DFEH v. Donald Schriver, Inc. (Ehlers) FEHC Dec. No. 84-07 (91-11; Order Modifying Decision Upon Remand, 5/28/91).

DFEH v. Jack's Restaurant and Jack Schat, Owner (Johnson) FEHC Dec. No. 84-08; re-issued as non-precedential FEHC Dec. No. 89-13 (9/4/89).

DFEH v. Bee Hive Answering Service, A Partnership, and Bill Graham (Dowing) FEHC Dec. No. 84-16.

DFEH v. Hart and Starkey, Inc., dba Shakey's Pizza Parlor, and Gary Hart, Individual (Perez, Reeder, Shaw-Watson, and Shaw) FEHC Dec. No. 84-23.

DFEH v. La Victoria Tortilleria, Inc.; La Victoria Tortilleria, and Juan Mora (Carrillo) FEHC Dec. No. 85-04.

DFEH v. Del Mar Avionics and Coy Wall, its Supervisor and Agent (Thompkins) FEHC Dec. No. 85-19.

DFEH v. Madera County; Madera County Civil Service Commission; Madera County Assessor Richard Gordon; and Lawrence (Jerry) Marsh (Hauksdottir). FEHC Dec. No. 90-03.

DFEH v. California State University, Hayward and Robert DeLemos, Individually (House) FEHC Dec. No. 88-18.

DFEH v. Huncot Properties and Charles Thomas (Harley) FEHC Dec. No. 88-21 (91-10; Order Modifying Decision Upon Remand, 5/23/91).

DFEH v. Guill, Blankenbaker and Lawson, a Professional Partnership; and Richard Tuckley, a Partner and an Individual (Okamoto) FEHC Dec. No. 89-15 (FEHC Dec. No. 91-16; Order Modifying Decision Upon Remand, August 1, 1991).

DFEH v. Barbara Rosenberg, individually and dba TMC Motorsports; Tim Martin as an employer and an individual (Hageman Opp) FEHC Dec. No. 90-09.

DFEH v. Robert Daniel Peverly, aka Robert John Puff, individually and dba Music City (La Plante, a minor; La Plante, Guardian Ad Litem; Thomas, a minor; Holt, Guardian Ad Litem) FEHC Dec. No. 91-05.

3. Non-Commission Cases

EEOC v. Murphy Motor Freight Lines, Inc. (D. Minn. 1980) 488 F. Supp. 381 [22 FEP 892]. Work-environment racial harassment by co-workers; supervisors knew or should have known and failed to take corrective action.

Meritor Savings Bank v. Vinson (1986) 106 S.Ct. 2399 [40 FEP Cases 1822]. Sexual harassment that results in hostile working environment constitutes a violation of Title VII even when no tangible economic loss occurs. Employers are not always automatically liable for supervisor harassment, but failure to inform employer does not necessarily insulate employer from liability.

4. Court Decisions on Commission Cases

Fair Employment and Housing Commission v. Jack's Restaurant and Jack Schat, Owner; California Appellate Court found no authority for compensatory and punitive damages. The California Supreme Court denied hearing [unpublished decision, 1989].

Rockwell International Corp. v. Fair Employment and Housing Commission; California Superior Court found that Rockwell International took immediate and appropriate action under the then existing law and attendant regulations [unpublished decision, 1989]. In compliance with the Court's instructions, the Fair Employment and Housing Commission set aside its decision, FEHC Dec. No. 87-34, and dismissed the accusation.

Peralta Community College District v. Fair Employment and Housing Commission, (1990) 52 Cal.3d 40. California Supreme Court held that Government Code Section 12970(a) does not authorize the FEHC to award compensatory damages in employment discrimination cases. Peralta is a non-precedential sexual harassment and termination decision in which the FEHC initially awarded \$20,000 in compensatory damages.

Donald Shriver v. Fair Employment and Housing Commission. Los Angeles County Superior Court granted respondent's writ of mandate setting aside compensatory and punitive damage award in FEHC Dec. No. 84-07 (4/26/91). FEHC issued 91-11, Order Modifying Decision Upon Remand (5/28/91).

Huncot Properties and Charles Thomas v. Fair Employment and Housing Commission. Los Angeles County Superior Court remanded case to FEHC to set aside the compensatory damage award in FEHC Dec. No. 88-21 (2/14/91). FEHC issued 91-10, Order Modifying Decision Upon Remand (5/23/91).

5. Commission Decisions on Appeal

Madera County v. Fair Employment and Housing Commission; writ at Superior Court.